(19,662.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 197.

ST. LOUIS DRESSED BEEF AND PROVISION COMPANY

vs.

MARYLAND CASUALTY COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Certificate of the United States circuit court of appeals for the eighth circuit	1	1
Statement of facts	1	1
Questions certified	6	4
Judge's certificate	7	5
Clerk's certificate	8	5

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 5, 1905.

1 United States Circuit Court of Appeals, Eighth Circuit.

ST. LOUIS DRESSED BEEF AND PROVISION Company, Plaintiff in Error, vs. MARYLAND CASUALTY COMPANY, Defendant in Error.	In Error to the Circuit Court of the United States for the Eastern District of Missouri.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on the sixth day of March, A. D. 1905, certifies that the record on file in the action above entitled, which is pending in this court upon a writ of error duly issued to review a judgment rendered in this action in favor of the defendant in error in the United States circuit court for the eastern district of Missouri, discloses the following facts:

The judgment which the writ of error challenges sustained a demurrer to the petition and dismissed the action. The plaintiff in its petition alleged the existence of these facts: The plaintiff is a corporation of the State of Missouri and the defendant is a corporation of the State of Maryland. On June 16, 1900, the defendant in consideration of the payment of $168 issued to the plaintiff a policy which contained these provisions: "In consideration of the application for this policy, a copy of which is hereto attached and which is made part of this contract, and of one hundred sixty-eight dollars ($168) premium, Maryland Casualty Company, of Baltimore, Maryland, (hereinafter called 'the company') does hereby agree to indemnify St. Louis Dressed Beef & Provision Co. of St. Louis, county of —— State of Missouri, hereinafter called 'the assured' for the term of one year beginning on the fifth day of July, 1900, at noon, and ending on the fifth day of July, 1901, at noon, standard time, at the place where this policy has been countersigned, against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any person
2 or persons, and caused through the negligence of the assured, by means of the horses or vehicles in his services, and the use thereof, as described in the application and while in the charge of the assured or his employees. Provided, however, that:

A. The company's liability for an accident resulting in injuries to, or in the death of one person is limited to five thousand dollars ($5000) and subject to the same limit for each person; the total liability for any one accident resulting in injuries to, or in the death of any number of persons is limited to ten thousand dollars ($10000).

This insurance is subject to the following conditions, which are to be construed as conditions precedent of this contract:

1. The assured, upon the occurrence of an accident, shall give im-

mediate notice thereof in writing, with full particulars to the home office of any claim which may be made on account of such accident.

2. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company will defend against such proceeding, in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for in clause "A" of special agreements as limited therein.

3. The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding, without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured when requested by the company shall aid in securing information and evidence and in effecting settlements, and in case the company calls for the attendance of any employee or employees as witnesses at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time.

3 8. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above. In no case except that of minors shall any action lie against the company after the expiration of six years from the date of the given injuries or death. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy.

This policy shall only cover losses sustained by and liability for any claims against the assured as a result of the risk specified in the contract or contracts hereto attached, and is issued and accepted upon the condition that all the provisions printed on the slip or slips attached to this policy are accepted and shall be fulfilled by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed."

The portion of the policy hereinbefore quoted commencing with the words "against loss from common law or statutory liability" and ending with the words 'entitled to make under this policy' at the close of paragraph numbered 8, were printed on the slip attached to the policy.

On May 25, 1901, the plaintiff became liable for damages on account of bodily injuries accidentally suffered by Mrs. Nellie Heideman and caused through the negligence of the plaintiff by means of a horse and vehicle in its service and the use thereof as described in

the application for the policy and while in charge of one John Berry, who was one of the plaintiff's employees. The plaintiff immediately gave the defendant notice of the accident and of the fact
4 that Nellie Heideman made a claim against the plaintiff for damages on account of the bodily injuries she had suffered from the accident and that Henry Heideman, her husband, also made a claim for damages against it on account of the loss of the services of his wife and of the expenses of physicians and nurses which resulted to him from her bodily injuries. On August 16, 1901, the defendant notified the plaintiff that it denied that it was liable to it on account of the damages resulting from the accident under its policy because, as it alleged, the driver of the plaintiff's wagon was not an employee of the plaintiff, but the fact was that this driver was an employee of the plaintiff and the accident and the damages were covered by the policy. On November 23, 1901, Nellie Heideman sued the plaintiff for $10,000 damages on account of the bodily injuries to her caused by the negligence of the plaintiff's driver and by the accident and Henry Heideman brought an action against it for $3000 damages which he alleged he sustained from the same cause. On November 29, 1901, the plaintiff in writing notified the defendant of the commencement of these suits and requested it to undertake the defense of said suits as its said policy provides it would do. But the defendant declined to undertake the defense upon the alleged ground that its policy did not cover the accident or the claims while the fact was that it covered both. The injuries to Mrs. Heideman were, among others, the breaking of her
5 right hip-joint socket bone, were serious and permanent and the plaintiff was liable for damages in each of the suits. It feared heavy judgments if the actions were permitted to proceed to trial. Thereupon, on April 15, 1902, it compromised the suits and paid Mrs. Heideman $2000 damages and her husband $500 damages on account of the injuries caused by the accident and the negligence of its driver.

The petition also contained the following averments: "The plaintiff served on defendant a written notice notifying it of the terms of settlement offered by said Nellie Heideman and Henry Heideman for the injuries sustained and damages suffered by them respectively, as aforesaid, and that plaintiff proposed to accept said settlements and pay said amounts, and to hold defendant responsible for such payment under its aforesaid policy; that defendant interposed no objection to said proposed settlements, relying upon its said disclaimer of any liability under said policy by reason of its alleged claim that the driver of said wagon was not in the employ of the plaintiff herein; and that said defendant by reason of the said denial and disclaimer of any liability waived all the conditions of the said policy as herein set forth. Plaintiff further states that by reason of defendant's failure and refusal to defend said actions brought by Nellie Heideman and Henry Heideman against plaintiff, and by reason of the waiver aforesaid, it was

obliged to and did defend said actions and employed counsel for that purpose, at an expense of two hundred and fifty dollars ($250.00), and that said employment of counsel was reasonably necessary, and that said sum of $250.00 is the reasonable value of said services so performed."

And the circuit court of appeals for the eighth circuit further certifies that the following questions of law are presented by the assignment of errors in this case, that their decision is indispensable to a decision of this case and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following questions:

6 1. Did the denial of all liability by the assurer and its refusal to defend the suits in the name and on behalf of the assured as provided by paragraph 2 of the policy constitute such a breach of the contract on its part that it released the assured from its agreement in paragraph 3 that it would not settle any claim except at its own cost without the consent of the assurer previously given in writing, and from the provision of paragraph 8 that no action should lie against the assurer as respects any loss unless for loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue?

2. Were the provisions of paragraphs 3 and 8 of the policy that the assured should not settle any claim except at its own cost, without the consent of the assurer, previously given in writing, and that no action should lie against the assurer as respects any loss under the policy unless brought by the assured to reimburse it for loss actually sustained and paid by it in satisfaction of a judgment after trial of the issue, waived by the assurer's denial of liability under the policy and by its failure and refusal to defend the suits against the assured according to the provision in paragraph 2?

3. Did the compromise by the assured of the suits against it after the assurer denied liability and refused to defend them and the payment by the assured of the damages claimed of it pursuant to the compromise, without the consent of the assurer and without the rendition of a judgment or a trial of the issues, prevent the assured from securing any recovery of the assurer upon the policy on account of the negligence, accident and injuries described?

4. Considering the terms of the policy, is the right of the assurer to insist upon the condition of paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured dependent upon the assurer's defense of the action against the assured according to the provision in paragraph 2?

5. Considering the terms of the policy, is the assurer's denial of liability under the policy a waiver of the condition in paragraph 8 respecting the rendition of judgment after trial and its satis-

7 faction by the assured?

6. Under the terms of the policy may the liability of the assured to the injured person and the extent of that liability be

litigated in the first instance in an action between the assured and the assurer where the assurer has denied its liability under the policy and has refused to defend an action brought against the assured by the injured person?

In witness whereof, the undersigned judges holding the United States circuit court of appeals for the eighth circuit have hereunto set their hands this 6th day of March, A. D. 1905, at St. Louis, Missouri, and ordered that the foregoing certificate be filed in said circuit court of appeals and by the clerk of said court duly forwarded to the Supreme Court of the United States.

WALTER H. SANBORN,
WILLIS VAN DEVANTER,
JNO. F. PHILIPS,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

Filed Mar. 6, 1905.
JOHN D. JORDAN, Clerk.

8 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of The St. Louis Dressed Beef and Provision Company, plaintiff in error, *vs.* The Maryland Casualty Company, No. 2089, December term, 1904, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this sixth day of March, A. D. 1905.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] U. S. circuit court of appeals eighth circuit. December term, 1904. No. —. St. Louis Dressed Beef and Provision Company, plaintiff in error, *vs.* Maryland Casualty Company. Certificate of questions to the Supreme Court of the United States. Filed Mar. 6, 1905. John D. Jordan, clerk.

Endorsed on cover: File No. 19,662. U. S. circuit court of appeals, 8th circuit. Term No. 197. St. Louis Dressed Beef and Provision Company *vs.* Maryland Casualty Company. (Certificate.) Filed March 15th, 1905. File No. 19,662.

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

ST. LOUIS DRESSED BEEF AND PROVISION COMPANY,
Plaintiff in Error,
v.
MARYLAND CASUALTY COMPANY,
Defendant in Error.
No. 197.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

The questions hereby certified to this Honorable Court, as presented by the assignment of errors in the case before the Court of Appeals for the Eighth Circuit, and upon which said court desires the instruction of the Supreme Court of the United States, are six in number.

We shall avail ourselves of the privilege of filing suggestions in support of the answer which we deem correct, and herewith for that purpose submit this, our brief.

The judgment, which the writ of error challenges, sustained a demurrer to the petition and dismissed the action. The petition declares upon a contract of insurance.

This contract of insurance, when stripped of all im-

material provisions, may be reduced to the following, in substance:

The insurer agrees that, in consideration of a premium paid, it will indemnify the assured for a term of one year, beginning on the 5th day of July, 1900, at noon, and ending on the 5th day of July, 1901, at noon, standard time, at the place where this policy has been countersigned:

> "This policy shall only cover loss sustained by and liability for any claims against the assured as a result of the risk, specified in the contract or contracts hereto attached, and is issued and accepted upon the condition that all the provisions printed on the slip or slips attached to this policy are accepted, and shall be fulfilled by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed."

On the slip attached to the policy specifying the risks were the following provisions:

> "Against loss from common law or statutory liability.
>
> "For damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any person or persons, and caused through the negligence of the assured, by means of the horses or vehicles in his service and the use thereof, as described in the application, and while in charge of the assured or his employes.
>
> "Clause 'A.' The company's liability for an accident resulting in injuries, or in the death of one person, is limited to five thousand dollars ($5,000.-00); and subject to the same limit for each person, the total liability for any one accident resulting in injuries to, or in the death of, any number of persons, is limited to ten thousand dollars ($10,000.-00)."

> "This insurance is subject to the following conditions, which are to be construed as conditions precedent to this contract:
>
> "1. The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing, with full particulars, to the Home Office of the

company in Baltimore, Md., or to its duly authorized agent. He shall give like notice, with full particulars, of any claim which may be made on account of such accident.

"2. If, thereafter, any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company will defend such proceeding in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for in clause 'A' of special agreements, as limited therein.

"3. The assured shall not settle any claim except at his own cost, nor incur any expense, nor interfere in any negotiations for settlement or in any legal proceeding, without the consent of the company previously given in writing; but he may provide at the time of the accident, such immediate surgical relief as is imperative. The assured, when requested by the company, shall aid in securing information and evidence, and in effecting settlements, and in case the company calls for the attendance of any employee or employees as witnesses, at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time.

"8. No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which the claimant might sue the assured for damages, unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered. and specified, as above. In no case, except that of minors, shall any action lie against the company after the expiration of six years from the date of the given injuries or death.

"The company does not prejudice by this clause any defense to such action which it may be entitled to make under this policy."

On May 25th, 1901, plaintiff became liable for damages on account of bodily injuries accidentally suffered by Mrs. Nellie Heideman and caused through the negligence of plaintiff, by means of a horse and vehicle in its service and in the use thereof, while in charge of one John Berry, who was one of plaintiff's employees. Plaintiff immediately gave the defendant notice of the accident and of the fact that Nellie Heideman made a claim against the plaintiff for damage on account of the bodily injuries she had suffered from the accident, and that Henry Heideman, her husband, also made a claim for damages against it for the loss of the services of his wife, and for expenses of physicians and nurses which resulted to him from her bodily injuries.

Upon August 16th, 1901, the defendant notified the plaintiff that it denied that it was liable to it on account of the damages resulting from the accident under the policy, because, as it alleged, the driver of the plaintiff's wagon was not an employee of the plaintiff. But the fact was, that this driver was an employee of the plaintiff, and the accident and damages were covered by the policy.

On November 23rd, 1901, Nellie Heideman sued the plaintiff for ten thousand dollars on account of the bodily injuries to her caused by the negligence of plaintiff's driver and by the accident; and Henry Heideman brought an action against it for three thousand dollars damages, which he alleged he sustained through the same cause.

On November 29th, 1901, the plaintiff, in writing, notified the defendant of the comencement of this suit and requested it to undertake the defense of said suits, as its said policy provided it would do; but the defendant declined to undertake the defense, upon the alleged ground that its policy did not cover the accident or the

claims, while the fact is, that it covered both. The injuries to Mrs. Heideman were very serious, and the plaintiff was liable for damages in each of the suits; it feared heavy damages if the actions were permitted to proceed to trial. That it, thereafter, negotiated for a compromise, and prior to effecting the compromise served, on defendant a written notice, notifying it of the terms of settlement offered by said Nellie Heideman and Henry Heideman for the injuries sustained and damages suffered by them respectively, as aforesaid, and that plaintiff proposed to accept said settlement and pay said amounts and to hold defendant responsible for such payment under its policy. That defendant interposed no objection to said proposed settlement, relying upon its said disclaimer of any liability under said policy by reason of its said alleged claim that the driver of said wagon was not in the employ of plaintiff herein. That, thereafter, on April 15th, 1902, plaintiff compromised the suits brought and paid Mrs. Heideman two thousand dollars damages and her husband five hundred dollars damages on account of the injuries caused by the accident and the negligence of its driver.

It is further stated that by reason of defendant's failure and refusal to defend said action, brought by said Nellie Heideman, and Henry Heideman, plaintiff was obliged to, and did, defend said actions and employed counsel for said purpose at an expense of two hundred and fifty dollars, and that said employment of counsel was reasonably necessary and that said sum of two hundred and fifty dollars is the reasonable value of said services so performed.

The United States Circuit Court of Appeals, with this state of facts before it, certifies the following questions to this court:

Questions Certified by United States Circuit Court of Appeals, Eighth Circuit, to Supreme Court of the United States.

1. Did the denial of all liability by the assurer and its refusal to defend the suits in the name and on behalf of the assured, as provided by paragraph 2 of the policy, constitute such a breach of the contract on its part that it relieves the assured from its agreement in paragraph 3 that it would not settle any claim, except at its own cost, without the consent of the assurer previously given, in writing, and from the provision of paragraph 8, that no action should lie against the assurer as respects any loss unless for loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue?

2. Were the provisions of paragraphs 3 and 8 of the policy that the assured should not settle any claim except at its own cost, without the consent of the assurer, previously given in writing, and that no action should lie against the assurer as respects any loss under the policy unless brought by the assured to reimburse it for loss actually sustained and paid by it in satisfaction of a judgment after trial of the issue, waived by the assurer's denial of liability under the policy and by its failure and refusal to defend the suits against the assured according to the provision in paragraph 2?

3. Did the compromise by the assured of the suits against it, after the assurer denied its liability and refused to defend them and the payment by the assured of the damages claimed of it, pursuant to the compromise, without the consent of the assurer and without the rendition of a judgment or the trial of the issues, prevent the assured from securing any recovery of the assurer upon the policy on account of the negligence, accident and injuries described?

4. Considering the terms of the policy, is the right of the assurer to insist upon the condition of paragraph 8, respecting the rendition of judgment after trial and its satisfaction by the assured, dependent upon the assurer's defense of the action against the assured according to the provision in paragraph 2?

5. Considering the terms of the policy, is the assurer's denial of liability, under the policy a waiver of the condition in paragraph 8, respecting the rendition of judgment after trial and its satisfaction by the assured?

6. Under the terms of the policy, may the liability of the assured to the injured person and the extent of that liability be litigated in the first instance in an action between the assured and the assurer where the assurer was denied its liability under the policy, and has refused to defend an action brought against the assured by the injured person?

In order to properly answer all of these questions, it may simplify matters first to decide whether or not this contract of insurance is one in which the insurer agreed to indemnify the assured against loss or damages *only*, or whether it not only agreed to indemnify against loss or damage, but *also* agreed to indemnify the assured against *liability* for loss or damages, for the reason that if this contract be construed to be one in which the insurer agreed to indemnify against liability for damages or loss, there can be no question but that the demurrer to plaintiff's petition should have been overruled, the allegations of the petition being that the plaintiff became liable in damages to the injured person on account of the accidental injury to Nellie Heideman through the negligence of one of its employees while in charge of one of its wagons.

I.

It appears from the provisions of the policy, taken as a whole, that the liability of the insurer first attaches under the policy upon receiving notice of the happening of an accident, and of the claim of the injured party for damages occasioned thereby; and that prior to the beginning of any suit by the claimant, the insurer has reserved to himself the exclusive right to negotiate for

a settlement, or to settle the claim, prohibiting the assured from settling the claim except at his own cost, and from incurring any expense other than to provide such immediate surgical relief as is imperative at the time of the accident, and from interfering in any negotiations for a settlement, without the consent of the insurer peviously given in writing, and requiring of him, upon request, that he shall aid the insurer in securing information and evidence, and in effecting settlements, and that, thereafter, in the event that the claimant brings suit against the assured to enforce his claim for damages on account of an accident covered by the policy, that the insured shall give immediate notice thereof to the insurer; whereupon, the insurer will do one of two things, under his right of election: either pay the assured the indemnity provided for in clause "A" of special agreements, as limited therein, or defend against such proceeding in the name and on behalf of the insured, or settle the same at its own cost; and again, in the event that it elects to defend, it is provided that the assured shall not interfere in any negotiations for a settlement or in any legal proceeding without the consent of the company previously given in writing, and shall be bound, upon request of the insurer, to aid in securing information and evidence, and in effecting settlements, and in the event that the insurer calls for the attendance of any employee or employees as witnesses in said suit, that the assured will secure his or their attendance, making no charge for his or their loss of time.

From which we see from the very terms of the instrument itself that it is not merely an agreement to indemnify the plaintiff against loss or damage, but that in case of an accident of such a character as to render the insured liable to the claimant, the insurer agrees to assume the liability and to take charge of all proceed-

ings therein, unless it elects to take advantage of the provisions of clause "A." And if such a construction be adopted, and this policy be declared to be a contract to indemnify against liability or loss or damage, clause "8" should be disregarded and left out of consideration, for the reason that it can have no bearing, unless the contract is construed to be one of indemnity against loss, and then only to indemnify against such a loss as is provided under clause "8," namely, a loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue.

This question of the difference between contracts of indemnity against loss and indemnity against liability for loss, has never been presented to this court for decision, to our knowledge. It has, however, been presented to several of the Supreme Courts of the different States.

In the case of Fenton v. Fidelity and Casualty Company, 36 Oregon, 283, Mr. Justice Bean, after stating the facts, delivered the opinion of the court:

> "There is a distinction made by the authorities between a contract of indemity against liability for damages and a simple contract of indemnity against damages. In the former case it has very generally been held that an action may be brought and a recovery had as soon as the liability is legally imposed, while in the latter case there is no cause of action until there is actual damage.
>
> "If, therefore, the policy, upon which this action is based, is a mere contract of indemnity, the payment by the Mill Company of the liability incurred by it for the services of the plaintiff, is a condition precedent to the right of recovery. If, on the other hand, the contract is one of indemnity against liability, a cause of action accrued thereunder as soon as the liability of the Mill Company to the plaintiff attached.
>
> "Upon this question the policy must speak for itself; and its several provisions, in our opinion, indicate quite clearly that it is not merely an agree-

ment to indemnify the Mill Company against such damage as it may suffer on account of injuries to its employees, but that in case of an accident to an employee, whereby a cause of action arises against it the Insurance Company will assume the liability on account thereof. By the express terms of the contract it agrees to indemnify the Mill Company, not only against actual damage, but against liability for such damage. The policy provides that the defendant shall be immediately notified of an accident and shall, thereafter, have exclusive right and power to settle and adjust any claim therefor, and control all legal proceedings in connection therewith. And the Mill Company is prohibited from settling any claim or incurring any expense without the written consent of the Insurance Company, except that in case of an accident it may provide such immediate surgical relief as may be imperative.

"It would, in our opinion, be inconsistent with the terms and provisions, as well as the object and purpose of the policy, to hold that the assured must actually pay and discharge the claim or demand made against it on account of the injury to one of its employees, as a condition precedent to the maintenance of an action on the policy.

"This is the interpretation given to a similar contract by the Supreme Court of Minnesota, in the case of Anoka Lumber Co. v. F. &. C. Co., 63 Minn., 286, and is in harmony with the construction of policies substantially the same by the courts of other States." * * *

"If, however, the meaning of the policy is in doubt, and its language is fairly and reasonably susceptible of two constructions, one favorable to the assured and the other to the defendant, the one is to be adopted which is the most favorable to the assured. This is the universal ruling in the construction of insurance policies, because they are drawn by the attorneys, officers and agents of the company, and it is but fair that if there should be any ambiguity or uncertainty in the language used it should be construed most strongly against the company."

Citing, among other cases:

American Surety Co. v. Pauley, 170 U. S., 133.

The provisions of the policy in the above case material to the question were almost identical with those of the policy now brought before the court. It provided:

> "In consideration of the warranties made in the application for this policy, and of $480.00, the F. & C. Co., of New York, hereinafter called 'The Company,' does hereby agree to indemnify the W. S. M. L. & M. Co., of Portland, hereinafter called 'The Assured,' for the term of twelve months * * * against liability for damages on account of fatal or non-fatal injuries accidentally suffered by an employee or employees of the assured * * * subject to the following agreements and conditions."

The first of these conditions limited its liability for an accident resulting in injuries to or death of one person to five thousand dollars, and its gross liability for a casualty to ten thousand dollars; the second required that, upon the occurrence of an accident and upon receipt of information of a claim on account of the accident, notice in writing should immediately be given the company; the third, that if thereafter any legal proceedings are taken to enforce the claim for damages on account of such accident, that the company will defend the same at its own cost and in the name and on behalf of the assured; the fourth prohibited the assured, except at its own cost, from settling any claim or incurring any expenses, interfering in negotiations for settlement, or in any legal proceedings, without the consent of the insurer, and requiring that the assured shall render aid in securing information and evidence and in effecting settlements; it permitted him to provide such immediate surgical relief as should be imperative.

It appeared that an employee of the insured was seriously injured while employed in its service, and that, immediate surgical relief being imperative, plaintiff, a physician and surgeon was employed by the insured to attend the injured man. Shortly thereafter the insured

became insolvent and its property went into the hands of a receiver, who, in pursuance of an order of court, assigned and transferred to the plaintiff its claim against the defendant for the liability incurred in providing immediate surgical relief for the injured employee, and he accepted the same in full payment and satisfaction of his claim against the Mill Company, and, thereupon, brought this action directly against the defendant to recover the sum of $150.00 alleged to be the reasonable value of his services. The insurer alleged the insolvency of the insured and that it had not paid, and would not be able to pay, any portion of plaintiff's claim. A demurrer was sustained to the new matter, from which the defendant appealed.

Again, in the case of Hoven v. Lake Superior Iron and Steel Co., 93 Wisc., 201, Marshall, J., delivering the opinion, decided that the policy of insurance, which is nearly identical with that now in suit, was a contract to indemnify the assured against liability, and not against damages only, and is illustrative of the principle of distinction involved.

In all of these cases, however, the question of interpretation turned upon whether or not it was essential to allege and show that an actual loss had been sustained and satisfied by a payment to the injured person; and in all of them it was held that since the contract was one against liability for loss, that the cause of action against the insurance company accrued as soon as an accident covered by the policy occurred and a claim thereunder was made by the injured party against the insured; the defense of the company being that their policy was one to indemnify against loss and until payment of the loss had been made by the assured the liability of the insurer did not attach.

II.

In the event that this court is of the opinion that this contract, when properly interpreted, is one wherein the insurer agreed to idemnify only against loss sustained and paid, then the effect the denial of liability by the insurer and its refusal to defend in the name and on behalf of the assured, as provided by paragraph 2 of the policy, in the absence of an election to pay the indemnity provided under clause "A," is the key to the answer to all of the questions presented to this court for decision, and constitutes a breach of its contract and released the insured from its agreement in paragraph "3" and from the provisions of paragraph "8." Whatever loss has been sustained has been paid. The amount of the loss to the assured can not be more than three thousand dollars, which it has paid; it may be less. The fact that it has paid $3,000,00 to compromise the loss does not fix the amount; it establishes the fact that all the loss which the complainant was liable for, or has sustained, has been paid. A judgment against an indemnitee, after notice to the insurer to defend suit, is conclusive of the amount and liability.

16 Am. & Eng. Ency., 180, Note 4, and cases cited;
Showers v. Wadsworth, 81 Cal., 270.

Such a judgment, without any notice to an indemnitor, is presumptive evidence of liability and its amount only.

16 Am. & Eng. Ency., 180, Note 5;
Kansas City, etc., R. Co. v. Southern Ry. News, 151 Mo., 373, 391;
Laing v. Hanson, (Texas), 36 S. W., 116, 118.

The defense of the Insurance Company is, in substance, that not only shall a loss be sustained and paid, but that the proof of loss shall be the one provided in the policy, and that this proof shall consist of a judgment against the assured after trial of the issue.

Our answer to this is, that the provisions of Section "8" were waived by a denial of all liability and the refusal to defend the suit, or by the breach by the insurance company of the provisions of Section "2" that it will defend against such proceedings in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the indemnity provided in clause "A." That this provision for the judgment and its payment is of the same nature and effect as the provision in fire insurance policies for a determination of amount and liability by arbitration, and that such arbitration "shall be a condition precedent to any right of action in law or in equity to recover for such loss." Such contracts are valid and binding as long as the indemnitor proceeds in accordance with them, and does not deny its liability.

Hamilton v. Ins. Co., 136 U. S. 242, 252.

But they are ineffective and are waived when the insurer denies all liability.

Weiner v. Fire Ins. Co., 153 Mass., 235, 238;
Savage v. Phoenix Ins. Co., 12 Mont., 458;
Pensel v. Home Ins. Co., 3 Wash. St., 485.

That the provisions that the Insurance Company shall have immediate notice of any suit brought against the assured—that it will defend the proceeding in the name of the assured, or settle it, or pay the indemnity provided in clause "A"—together with the provision prohibiting the assured from settling or incurring expense, or interfering in any negotiations or settlement —and that no action shall lie against the company

until after judgment and payment thereof—are all for the benefit of the Insurance Company, and for the purpose of enabling it to determine for itself the amount of the liability, and that this is the true effect, purpose and intent of these provisions, is shown by the last clause of subdivision "8," wherein it expressly recites that it *shall not prejudice any defense to the action which it may be entitled to make by insisting upon the provisions of clause 8.*

Are these provisions anything more than a mode of proof of the liability which is to be evidenced by the final judgment, if this mode is pursued, in the same way that proofs of loss, awards of arbitrators and appraisals, and the usual provision in insurance policies that no action shall be maintained until such proofs, awards and appraisals are made, prescriptions of the manner of proof in ordinary insurance against fire or death? Provisions for the mode of proof in ordinary fire and life insurance are waived by a denial of liability. Are the provisions of this policy with reference to the mode of conducting the suit against the insured and the judgment and payment thereof anything more than a method of proof which is waived when the company denies its liability and refuses to follow that mode?

In Ross v. American, etc. Ins. Co., 56 N. J. Eq., at page 55, where the character of a judgment against the insured under these provisions is under discussion, Vice Chancellor Pitney said:

> "The recovery of the judgment against the insured by the injured party is not the injury against which the insurer insures him, but it is the liability for the consequences of the accident against which he is insured, and of which liability the judgment is a mere test or mode of proof. In fact the recovery of the judgment is a mere mode by which the insured proves to the insurer that the

intrinsic character of the accident was such that he was liable for the consequences of it. In this respect the judgment resembles the proof of loss to be furnished to an ordinary insurer against fire or shipwreck before action brought, or proof of death in case of life insurance. These are usual prerequisites to liability to action, but do not constitute the cause of action, and in the case of a judgment against the party insured under one of these policies for damages for the result of the accident, the liability, though legally fixed at that time, relates back to the accident itself. In contemplation of law, the insured either was or was not, from the first, liable for the consequence of the accident, and the presumption is that the result of the investigation of the facts was never doubtful from the first and always sure to result according to the actual fact, so that the recovery of the judgment can not be held or treated in the law as a contingency which may or may not happen, but a mere judicial ascertainment of the intrinsic character of the occurrence which determined the liability of the insured. Again, another office of the judgment is to ascertain by the only legal mode the extent of the damages, precisely as the extent of the damages in case of fire or shipwreck is to be ascertained by an inquiry undertaken before payment."

In the case from which this quotation was taken there had been no denial of liability, and consequently this provision of the contract remained in force and prescribed the only legal mode of ascertaining the extent of the damages, in the same way that an award or appraisal in an ordinary insurance policy is the only legal mode of ascertaining the damages from a loss, and conditions the right of action in the absence of denial of liability, or other waiver.

When a denial of liability is made in the case of a loss by fire, the person insured may prove his loss by evidence in court without the award or appraisal speci-

fied in the contract. So the beneficiary of a life policy may recover without furnishing proof of death in case of a denial of liability.

The only reason for and value of the provision in this policy, that the proof of loss shall be evidenced by a judgment after trial of the issue, is that it may give the insurer an opportunity to cut down the amount of recovery, since under the provisions of the policy, he, the insurer, is to conduct the defense and to be the real party defendant to the action. Upon the refusal of the insurer to conduct the defense and its denial of liability, we submit that it is estopped from insisting upon the mode of ascertaining the damages prescribed by the policy.

In discussing the rights and duties of the insured under the provisions of a policy regarding the defense of suits, the Court of Appeals of Kentucky says, in the case of Southern Ry. News Co. v. Fidelity & Casualty Co., 83 S. W., 620, 622:

> "The appellant, after having notified the appellee that the liability had been incurred by reason of the injury, was bound to make the loss as small as possible so far as is reasonable, although appellee did not avail itself of the provision in the policy to personally conduct the defense to the suit. Appellant might have compromised the claim so long as it acted in good faith and with reasonable prudence, such as a prudent person similarly situated would have done for himself. This would have bound appellee to pay to it the loss actually sustained by the compromise. The compromise, if one was effected as is charged, may have been taken into consideration as evidence of the actual loss sustained, but, of course, not conclusive evidence of it. Other evidence might also be admitted to show whether it was or was not a judicious and fair settlement."

This contract of insurance contained mutual cove-

nants. The insurance company had the right to defend the suits. The assured had agreed to keep its hands off, and that it would not compromise, settle or pay until the suits so defended by the insurance company went to judgment, and that it should not recover against the insurance company until it had paid such judgments. When the insurance company denied all liability and declined to defend the suits, it thereby waived the provisions of the policy regarding the mode of determining the liability and the damages, and left the assured with the right to settle or compromise the claims against it or to contest them, as it saw fit.

Insurance policies generally contain the provision that no action shall be maintained against the insurance company upon any claim for damages by fire or by death, unless the proofs specified in the policy have been prepared and furnished to the companies, unless, in fire cases, the damaged property has been appraised, and unless, in many cases, the questions have been referred to arbitrators and an award has been secured, and nearly all of them provide that no action shall be maintainable and no claim shall be payable until sixty days after the proofs have been furnished; but (1) a denial of all liability waives the provision that no action can be maintained until sixty days after proofs of loss, and makes it available immediately.

Tayloe v. Ins. Co., 9 How., 390, 403;
California Ins. Co. v. Gracey, 24 Pac., 577, 578;
4 Joyce on Insurance, Section 3211.

(2.) A denial of liability waives the provision requiring proof of loss by fire and avoids the provision that no action shall be maintained until such proofs have been furnished.

Knickerbocker Ins. Co. v. Pendleton, 112 U. S., 696, 710;
4 Joyce on Insurance, Section 3257.

(3.) The provision in a policy—"that no suit or action against this company for recovery of any claim for loss by virtue of this policy shall be sustained in any court of law or chancery unless award of loss by arbitration as herein provided for, shall have been first returned," is waived by a denial of all liability and an action is then at once maintainable.

Bailey v. Aetna Ins. Co., 46 N. W. Wis., 440.

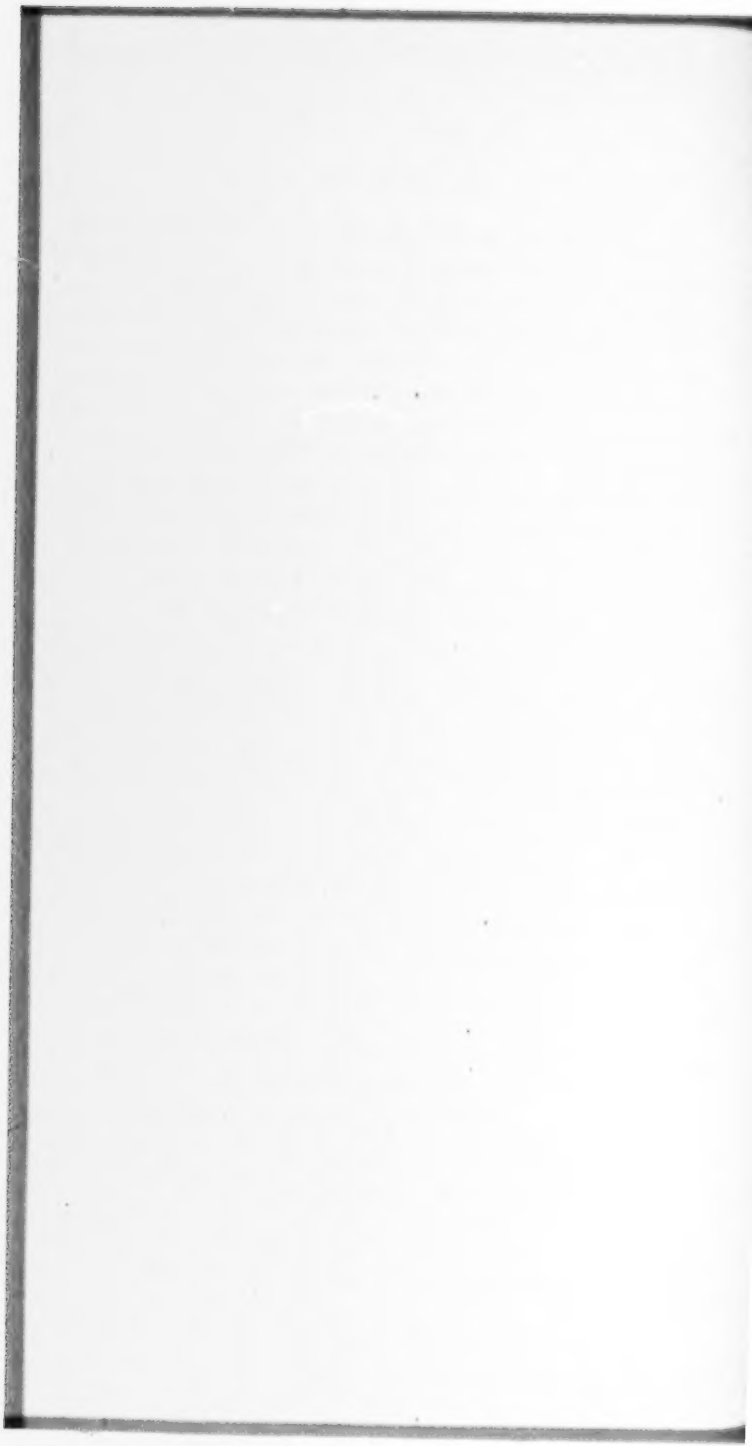
Beach says that the general rule is that arbitration, appraisal and all other acts which are made conditions precedent to an action upon a contract of insurance are waived by a denial of all liability.

Beach on Insurance, Section 1244.

This is an insurance contract. It is governed by the ordinary rules which control contracts of insurance, and we submit that the mode of ascertaining the amount of loss and the liability was a provision expressly stated in the policy to be a condition precedent, and is waived by a denial of all liability.

We submit, therefore, in answer to the questions that the right of action of plaintiff in error against defendant in error should be sustained, and that the demurrer interposed in the court below should be overruled.

WILLIAM B. THOMPSON,
FORD W. THOMPSON AND
RALPH CREWS,
Attorneys for Plaintiff in Error.



Supreme Court of the United States

OCTOBER TERM, 1908.

No. 707.

ST. LOUIS DRESSED BEEF AND PROVISION COMPANY, *Appellant*,

vs.

MARYLAND CASUALTY COMPANY, *Appellee*.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF ON BEHALF OF THE APPELLEE.

FRANK GOSNELL,
GEO. WEEMS WILLIAMS,
Attorneys and of Counsel for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 197.

ST. LOUIS DRESSED BEEF AND PROVISION COMPANY, *Appellant*,

vs.

MARYLAND CASUALTY COMPANY, *Appellee.*

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF ON BEHALF OF THE APPELLEE.

STATEMENT OF FACTS.

On the 16th day of June, 1900, the appellee, a corporation of the State of Maryland, hereinafter sometimes called "the company," in consideration of a premium of $168.00, issued to the appellant, a corporation of the State of Missouri, sometimes hereinafter called "the assured," its policy wherein and whereby it agreed "to *indemnify* the assured" for the term of one year from the 5th day of July, 1900, at noon; (italics and small caps ours)

"AGAINST LOSS FROM COMMON LAW OR STATUTORY LIABILITY for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any person or persons, and caused through the negligence of the assured, by means of the horses or vehicles in his services, and the use thereof, as described in the application and while in the charge of the assured or his employees.

Provided, however, that :

A. The company's liability for an accident resulting in injuries to or in the death of one person is limited to five thousand dollars ($5,000), and subject to the same limit for each person; the total liability for any one accident resulting in injuries to, or in the death of any number of persons is limited to ten thousand dollars ($10,000).

This insurance is subject to the *following conditions*, which are to be construed as *conditions precedent* of this contract :

1. The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing, with full particulars to the home office of any claim which may be made on account of such accident.

2. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident *covered by this policy*, immediate notice thereof shall be given to the company, and the company will defend against such proceedings, in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for in clause "A" of special agreements as limited therein.

3. The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding, without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured when requested by the company shall aid in securing information and evidence and in effecting settlements, and in case the company calls for the attend-

ance of an employee or employees as witnesses at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time.

8. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained, and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above.

In no case, except that of minors, shall any action lie against the company after the expiration of six years from the date of the given injuries or death. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy.

This policy shall only cover losses sustained by and liability for any claims against the assured as a result of the risk specified in the contract or contracts hereto attached, and is issued and accepted upon the condition that all the provisions printed on the slip or slips attached to this policy are accepted and shall be fulfilled by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed."

That portion of the policy above quoted, except the last paragraph, commencing with the words "This policy shall only cover" was printed on the slip attached to the policy.

It appears that on May 25, 1901, a certain Nellie Heideman was injured through the alleged negligence of the assured by means of a horse and wagon in its service, while in charge of one John Berry, who was alleged to have been in the employ of the assured. The assured immediately gave notice of the accident to the company, and of the fact

that Mrs. Heideman made a claim against the assured on account of the bodily injuries she had so suffered, and that Henry Heideman, her husband, also made a claim for damages for loss of her services and medical attendance. On August 16, 1901, the company notified the assured that it denied liability because the driver of the wagon was not an employee of the assured.

On November 23, 1901, two suits were instituted against the assured growing out of the accident, one by Nellie Heideman for $10,000 and the other by Henry Heideman for $3,000. Within one week thereafter the company was notified in writing of the suits and requested to undertake the defense of the same, but declined to do so, alleging that its policy did not cover the accident or the claims. The assured, itself, thereupon undertook the defense of the suits, and on April 15, 1902, before they came on to be tried compromised them by paying Mrs. Heideman $2,000 and Mr. Heideman $500; the assured also paid $250 to its counsel for professional services rendered in defense of the actions. Before making the compromise, however, the assured notified the company in writing of the terms of the proposed settlement and of its purpose to pay the amounts and to hold the company responsible for the same. The company interposed no objection to the proposed settlement, relying upon its disclaimer of any liability under the policy, because the driver of the wagon was not an employee of the assured. The reason the compromise was made was because the assured "*feared heavy judgments if the actions were permitted to proceed to trial.*"

After the compromise of the suits, the assured brought its action against the company to recover the amounts so paid in settlement of the two Heideman suits, and the amount paid its counsel for defending the same down to the time of settlement, and in its petition averred the facts above detailed and also averred that the driver of the wagon in

question was in its employ at the time of the accident, and that the assured was liable in damages to the Heidemans in consequence thereof, and that the accident was covered by the policy. The company demurred to the petition, which demurrer was sustained by the Circuit Court, and the petition dismissed. Upon a writ of error to review this judgment, the learned Judges of the Circuit Court of Appeals for the Eighth Circuit, (Sanborn and Van Devanter, Circuit Judges, and Philips, District Judge), being in doubt, desire the instruction of this Honorable Court upon the following questions:

"1. Did the denial of all liability by the assurer and its refusal to defend the suits in the name and on behalf of the assured as provided by paragraph 2 of the policy constitute such a breach of the contract on its part that it released the assured from its agreement in paragraph 3 that it would not settle any claim except at its own cost without the consent of the assurer previously given in writing, and from the provision of paragraph 8 that no action should lie against the assurer as respects any loss unless for loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue?

2. Were the provisions of paragraphs 3 and 8 of the policy that the assured should not settle any claim except at its own cost, without the consent of the assurer, previously given in writing, and that no action should lie against the assurer as respects any loss under the policy unless brought by the assured to reimburse it for loss actually sustained and paid by it in satisfaction of a judgment after trial of the issue, waived by the assurer's denial of liability under the policy and by its failure and refusal to defend the suits against the assured according to the provision in paragraph 2?

3. Did the compromise by the assured of the suits against it after the assurer denied liability and refused to defend them and the payment by the assured of the damages claimed of it pursuant to the compromise without the consent of the assurer and without the rendition of a judgment or a trial of the issues prevent the assured

from securing any recovery of the assurer upon the policy on account of the negligence, accident and injuries described?

4. Considering the terms of the policy, is the right of the assurer to insist upon the condition of paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured dependent upon the assurer's defense of the action against the assured according to the provision in paragraph 2?

5. Considering the terms of the policy, is the assurer's denial of liability under the policy a waiver of the condition in paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured?

6. Under the terms of the policy may the liability of the assured to the injured person and the extent of that liability be litigated in the first instance in an action between the assured and the assurer where the assurer has denied its liability under the policy and has refused to defend an action brought against the assured by the injured person?"

ARGUMENT.

Briefly stated the questions certified are as follows:

1, 2, 3. Did the fact that the company denied liability and refused to defend the Heideman suits constitute such a breach of contract *as released the assured* from its agreement not to settle the suits *without the written consent of the company*, and, from the provision of the policy that *no action should lie against the company* UNLESS FOR LOSS ACTUALLY SUSTAINED AND PAID BY THE ASSURED IN SATISFACTION OF A JUDGMENT AFTER TRIAL OF THE ISSUE, as stated in the first question, or as put in the second question, were these provisions in favor of the company *waived* by its denial of liability and failure to defend, and as embraced in the third question did the compromise of the suits in view of such denial and failure prevent a recovery from the company?

4, 5. Is the right of the company to insist upon the provisions of paragraph 8 of the policy dependent upon its defense of the suits against the assured, and did the com-

pany waive the provisions of that paragraph by its denial of liability; these are the propositions contained in the fourth and fifth questions.

6. May the liability of the assured to Mrs. Heideman and the extent thereof in the circumstances narrated, be litigated in the first instance in this action?

It is to be observed that these several questions paraphrase this single proposition: Whether or not the company, notwithstanding it denied liability under its policy and refused to defend the Heideman suits, had the right to insist (1) that the suits could not be settled by the assured *except at its own cost* without the written consent of the company, and (2) that there can be no recovery against it whatever, because the claim of the assured is not for reimbursement of a *loss actually sustained and paid by it in satisfaction of a judgment after trial of the issue.*

That the company is correct in its contention that the assured is not entitled to recover, is to us, perfectly manifest. The intention of the parties is plain and unambiguous. The company agreed to *indemnify the assured* "AGAINST LOSS FROM COMMON LAW OR STATUTORY LIABILITY." The insurance is subject to certain *conditions precedent*, one that the assured should not, *except at its own cost*, settle any claim without the written consent of the company, and another that "*No action shall lie against the company* as respects any loss under this policy, *unless it shall be brought by the assured himself to reimburse him* FOR LOSS ACTUALLY SUSTAINED AND PAID BY HIM IN SATISFACTION OF A JUDGMENT AFTER TRIAL OF THE ISSUE."

It is to be observed that this policy is one of the most modern in form and must not be confused with those heretofore in use and under which recovery could be had the moment the assured became liable for damages. There is a clear distinction between a contract against "LIABILITY FOR DAMAGES" and a contract of indemnity against "LOSS FROM LIABILITY FOR DAMAGES." In the former, an action may be

brought, and a recovery had, as soon as the liability is legally imposed—such are those involved in the cases relied on by the assured in the present action—while in the latter, *i. e.*, similar to the one at bar, it has never been held, except in New Hampshire, that a cause of action arose, until payment by the assured of a judgment recovered after a trial of the issue.

As stated in Gilbert vs. Wiman, 1 N. Y. 550:

> "In contracts of indemnity where the obligation is to perform some specific thing or to save the obligee from a charge or liability, it seems the contract is broken when there is a failure to do the specific act, or when such charge or liability is incurred.
>
> "But where the obligation is that the party indemnified shall not sustain damage or molestation by reason of the acts or omissions of another, or by reason of any liability incurred through such acts or omissions, *there is no breach* UNTIL ACTUAL DAMAGE IS SUSTAINED.
>
> "And in such cases a judgment recovered against the party indemnified, on account of the acts or neglect of another for which he is answerable, *without payment of the judgment*, or some part thereof, does not entitle him to sustain an action against the indemnitors."

To the same effect are the following cases:

Frye, Admr., vs. Bath, Gas and Electric Co., 97 Me. 241; s. c. 59; L. R. A. 44; (1903.)

Moses vs. Travellers' Ins. Co., 63 N. J. Eq. 260; s. c. 49 Atl. Rep. 720; (1901.)

Finley vs. United States Casualty Co., 83 S. W. Rep. 2; (1904.)

Cushman vs. Fuel Co., 122 Iowa, 656; (1904.)

Connolly vs. Bolster, 72 N. E. Rep., 981, Mass.; (1905.)

O'Connell vs. N. Y., N. H. & H. R. R., 187 Mass. 272; s. c. 72 N. E. R. 979.

Munro vs. Maryland Casualty Co., Supreme Court, N. Y.; (1905.)

Henderson & Bro. vs. Maryland Casualty Co., Superior Court of Penna.; (1905.)

In Frye, Admr., vs. Bath, Gas and Electric Co., (*supra*), the Maine Judicial Court construed a policy of insurance identical in terms with the one now under consideration, with the exception that there was no limit as to the time within which the assured should satisfy the judgment.

It appears that the Fidelity and Casualty Company issued to the Bath, Gas and Electric Company its policy of insurance "*against loss from common law or statutory liability for damages* on account of bodily injuries, fatal or non-fatal, accidently suffered by any employees of the assured whilst on duty." One of the conditions of the policy was as follows:

> "No action shall lie against the company [the insurer] as respects any loss under this policy, unless it shall be brought by the assured himself, *to reimburse him for loss actually sustained and paid by him*, in satisfaction of a judgment after trial of the issue."

One of the employees of the assured met with an accident whilst in its employ, and brought suit against the assured. He having died in the meantime, a judgment was rendered in favor of the appellant, his administrator. Thereafter the assured became insolvent, and made a common law assignment for the benefit of its creditors, and the judgment recovered as above mentioned, became worthless. A bill in equity was then filed by the Administrator of the employee against the assured, also its assignee under the common law assignment, and against the Fidelity and Casualty Co. It was there decided that—

> "A contract to indemnify an employer *against loss by reason of liability* for accidental injuries to employees, does not inure to the benefit of an injured employee, so that he can enforce payment of it in case the employer becomes insolvent and makes an assignment for creditors before he receives his judgment, so that the judgment cannot be enforced—especially where the contract provided that no action shall lie against the insurer, as

respects any loss under the policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

Wiswell, Chief Justice, in delivering the opinion of the Court, said in part, (italics and small caps ours):

"We are unable to perceive any ground upon which the bill can be sustained and the relief prayed for granted. The contract of the insurer was with the Gas Company to indemnify that Company '*against loss*' from liability for damages on account of bodily injuries accidently suffered by an employee, and caused by the negligence of the assured. The use of the word '*indemnify*' shows the object and nature of the contract. It was to reimburse, or make whole, the assured against loss on account of such liability. There can be no reimbursement when there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guarantee the Gas Company's liability for negligence to its employees. *It was not a contract of insurance against liability*, but of INDEMNITY AGAINST LOSS BY REASON OF LIABILITY.

"This distinction was clearly recognized in the case of Anoka Lumber Co. vs. Fidelity and Casualty Company, 63 Minn., 286, 30 L. R. A., 689, 65 N. W. 353. *There is no stipulation in this contract* that the insurer shall pay to the employer '*all sums for which it shall become liable to its employees*,' as in Hoven vs. Employers' Liability Assur. Corp. 93 Wis. 201, sub. nom. Hoven vs. West Superior Iron and Steel Co., 32 L. R. A. 388, 67 N. W. 46. Nor did the insurer contract to pay, '*all damages with which the insured might be legally charged, or required to pay, or for which it might become legally liable*,' as in American Employers' Liability Ins. Co. vs. Fordyce, 62 Ark., 562, 36 S. W. 1051, in which this distinction is noticed in this language: 'The difference between a contract of indemnity and one to pay legal liabilities is, that upon the former an action cannot be brought and a recovery

had until the liability is discharged, whereas, upon the latter, the cause of action is complete when the liability attaches.

"In this case, as we have seen, the contract was one of indemnity only. It was not obtained by the Gas Company for the benefit of its employees, but for its own benefit exclusively, to reimburse it for any sum that the company might be obliged to pay, and had paid on account of injuries sustained by an employee through its negligence. Independently of the *condition* in the contract of insurance above quoted, WE SHOULD BE COMPELLED TO CONSTRUE THIS CONTRACT AS ONE OF INDEMNITY ONLY.

"*But this provision puts an end to all questions or doubt, if any there could be.* The parties have expressly provided in the contract which they chose to make, that 'NO ACTION SHALL LIE against the Company AS RESPECTS ANY LOSS UNDER THIS POLICY, unless it shall be brought by the assured himself *to reimburse him for loss actually sustained and paid by him* in satisfaction of a judgment after trial of the issue.' By reason of the unequivocal language of this provision, the undertaking of the insurer was expressly limited to liability in an action brought by the insured, '*to reimburse him for loss actually sustained and paid by him.*' THERE CAN BE NO DOUBT ABOUT THE MEANING OF THIS LANGUAGE, AND NO QUESTION ABOUT THE RIGHT OF THE CONTRACTING PARTIES TO INSERT SUCH A PROVISION IN THEIR CONTRACT FOR THE PURPOSE OF MAKING CLEAR THE NATURE AND LIMIT OF THE LIABILITY OF THE PARTIES OR OF EITHER OF THEM."

Moses vs. Travellers Insurance Co., (*supra*), decided by the Court of Errors and Appeals of New Jersey, is another case where a policy, containing precisely similar language, was construed, and it was held that not the amount of the employee's judgment, but the amount paid by the employer thereon, was the sum for which the insurer was responsible. The Court decided that the transfer of the employer's property to a trustee in bankruptcy, by operation of the United States Bankrupt Act, was payment within the requirement

of this clause, and perfected the liability of the insurer for so much as the employee was entitled to receive out of the bankrupt's estate; that this liability of the insurer passed to the trustee in bankruptcy; and that the amount for which the insurer was liable would be determined by ascertaining what percentage all the assets of the bankrupt, outside of the insurance policy, would pay on all the debts proved against the estate, outside of the employee's judgment.

In Finley vs. U. S. Casualty Co. (*supra*), the policy contained conditions identical in terms with those in the case at bar. The Supreme Court of Tennessee held as follows:

> "Agreements in an employer's liability policy, that if suit is brought against the assured, he shall immediately forward the process to the insurer, which will defend against or settle the claim, do not, when considered with a provision of the policy declaring its purpose to be indemnity to the assured *'against loss from liability for damages;'* and another agreement that no action shall lie against the insurer in reference to any loss under the policy unless brought by the insured himself to reimburse him for payment by him in satisfaction of a judgment, render the policy one of indemnity against liability, but IT IS A POLICY AGAINST LOSS OR DAMAGE BY REASON OF LIABILITY, UNDER WHICH THE AMOUNT OF INSURANCE DOES NOT BECOME AVAILABLE until payment of loss by the assured."

In Cushman vs. Fuel Co. (*supra*), the policy was issued by the London Guarantee and Accident Co. to the Carbondale Fuel Co. Cushman was an employee of the Fuel Company, and having been injured, brought an action, and recovered a judgment against the Fuel Company. The Fuel Company being insolvent, Cushman instituted proceedings against it and the guarantee company for the recovery of the judgment. The policy contained a provision that no action should lie for a loss unless brought *"by the assured to reimburse him for a loss actually sustained and paid in satisfaction of a judgment after the trial of the issue."*

Sherwin, Judge, in delivering the opinion of the Court, said at page 657 (italics and small caps ours):

> "While the policy provided that the guarantee company might appear and defend for the Fuel Company in any action brought against it for personal injuries, such provision was for the protection of the guarantee company alone, and imposed no liability upon it beyond the terms of the contract. * * * The only obligation of the guarantee company was to indemnify the Fuel Company against a '*loss actually sustained and paid in satisfaction of a judgment after the trial of the issue.*' This covenant is AS EXPLICIT AND CERTAIN AS LANGUAGE COULD WELL MAKE IT, and as between the parties to the contract, no recovery could be had against the guarantee company because the judgment against the Fuel Company was not paid, and, consequently, the covenant was not broken."

So in the case of Connolly vs. Bolster, (*supra*) where the policy was subject to the agreement, that if any suit should be brought for damages immediate notice should be given the insurer, so that it could defend or settle the same, and that the assured would not settle or interfere with negotiations for settlement or in any legal proceeding, without the consent of the insurer, and it was further provided that "*no action shall lie against the insurer for any loss under the policy unless it be brought by the insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issues.*" The Supreme Court of Massachusetts held that as the assured had not paid the judgment there could be no recovery against the insurance company.

In Munro vs. Maryland Casualty Co., (*supra*), a policy was issued by this company identical in form with the one now before the Court.

In the course of the opinion of Judge Leventritt, speaking for the Supreme Court of New York, he said, (italics and small caps ours):

"I deem it necessary to consider briefly but three of the plaintiff's contentions. In addition to the $5,000 is the defendant also liable (*a*) *for the* INTEREST ON THE VERDICT *or any part of it from the time when the judgment thereon was rendered;* (*b*) for the taxable costs of the suit and for the interest on such costs, and (*c*) *for damages or loss sustained in the form of* ADDITIONAL INTEREST *as a result of defendant's delay in prosecuting the appeal had in the action?* The determination of the first and to an extent of the second question depends on the construction to be given to the policy, *whether as a contract insuring against liability* OR AGAINST LOSS FROM LIABILITY. The authorities are conflicting."

"The divergent views are well stated in two very recent cases: Sanders vs. Frankfort Ins., (72 N. H. 465) and Connolly vs. Bolster, (72 N. E. Rep. 981; Supreme Court of Mass., not yet officially reported.) In each case the policy here involved was under consideration. In the former, reviewing practically all the authorities, the Court, construing the word 'defend' as used in the second clause of the general agreements of the policy to mean 'to successfully defend' held that to avoid all inconsistency between that and the eighth clause of the general agreements, providing in effect that no action should lie against the company until after payment by the assured of the judgment recovered against him, the payment of the judgment was not a condition precedent to an action on the policy. In the latter, citing practically the same authorities, the Supreme Court of Massachusetts expresely disapproves of the doctrine and reasoning of the Sanders case and held that no right of action arose against the insurer until payment by the assured. In other words, the Sanders case construed the contract as one insuring against liability, while the Connolly case construed it as one insuring against *loss* from liability. *I follow the Connolly case as more in consonance with the natural and reasonable meaning* of the words and terms of the policy; *its criticism of the Sanders case* SEEMS TO ME SOUND AND CONVINCING.

"*If then it is a condition precedent to the liability of the defendant that the assured must first pay the judgment,*

IT FOLLOWS THAT THERE CAN BE NO LIABILITY IN EXCESS OF THE $5,000 FOR INTEREST UNTIL THE PLAINTIFF HAD COMPLIED WITH THE CONDITION WHICH MADE THE DEFENDANT'S LIABILITY COMPLETE. THERE IS NO LIABILITY FOR INTEREST OR ANYTHING ELSE UNTIL THE ASSURED HAS PAID."

In Henderson & Brother vs. Maryland Casualty Company (*supra*), the Superior Court of Pennsylvania construed a similar policy of this company in the same way, holding there was no liability until payment of the judgment by the assured after a trial of the issue. The precise question there involved was the right of the assured to interest on the amount insured, either from the date the company assumed control of the litigation or from the date of the verdict. The assured had been reimbursed the full amount of the policy, with interest from the time the judgment was satisfied; consequently the action failed.

Great stress was laid by the assured in the case last cited upon the concluding paragraph of the policy, which was identical with the paragraph on page 2 of the record, commencing with the words, "This policy shall only cover losses sustained by and liability for any claims against the assured * * *," the claim being made that by virtue of that provision the contract was one against "*liability for damages*," and that, therefore, interest ran from one or the other of the two periods mentioned, and not from the date of payment of the judgment, but the learned Court held that the paragraph was controlled by paragraph 7, which was identical with paragraph 8 in the present policy. This ruling was obviously correct. The conjunction "and" shows there must be both a loss and a liability as to each claim. It is entirely in consonance with the provisions of the policy showing the contract to be one of indemnity against "loss from liability," and not one against "liability for damages."

We may imagine a liability being incurred by the assured, which the company would have been, by the terms of its

policy, under obligation to assume without that liability being followed by an actual loss. For instance, had the company elected not to defend but to settle the suit; or had it elected not to defend, but to pay the indemity agreed upon. Either one of these courses would naturally be pursued, when a defense would admittedly be hopeless. So there might be a liability under condition 3, where it is stipulated that the assured "may provide at the time of the accident such immediate surgical relief as is imperative." But it surely never was the contemplation of the parties that the policy should be converted from one of indemity *"against loss from liability"* into a contract against *"liability for damages,"* simply by the company exercising its right and privilege to deny liability and refuse to defend, if it believed, in good faith, as in this case, that the accident in respect of which suit was brought, was not a claim covered by its policy.

As the case of Henderson & Bro. vs. Maryland Casualty Co. (*supra*), decided that the final paragraph was qualified and controlled by the 7th paragraph (paragraph 8 in this case), so in Finley vs. United States Casualty Co. it was decided that the other provisions were likewise controlled by that paragraph, the Supreme Court of Tennessee saying:

> "There are some parts of the policy copied in this opinion that are apparently on the first consideration, out of harmony with the view that the contract was intended as one of indemnity merely against loss from liability for damages rather than against liability simply. We refer to the second and third paragraphs under the caption 'General Agreements.' Similar terms were referred to in Fenton vs. Fidelity and Casualty Co., *supra*, as indicating that the contract was one simply against liability. This construction is very suggestive, and if the clause referred to stood alone, it would be difficult to assign any other meaning to them. *However, they are qualified and controlled* BY THE SEVENTH SPECIAL AGREEMENT. [Practically identical with paragraph 8 of the policy now under consideration.] When construed

along with the latter provision the following is observed to be the meaning: While the company is bound to reimburse the assured for loss actually sustained and paid by him in satisfaction of a judgment recovered against him by an employee, yet, in order to make sure as far as possible, that there shall be no recovery as a basis on which to subsequently establish a claim, the company reserves the right to defend the litigation; also to supervise any settlements that may be made, and to have a free hand in negotiating settlements of a claim made against the assured. As stated, if these provisions—that is, the second and third general agreements—stood alone, they would furnish strong reasons for construing the contract as one against liability; but, from what has just been stated, it is perceived that they have a proper place in a contract against loss from liability for damages, in the way of enabling the company to minimize the loss.

"When we consider that the provisions in the outset of the policy is to *indemnify loss * * * from * * * liability for damages*, and that in the seventh general agreement it is provided '*that no action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment*,' etc., we think there can be no doubt that this policy must be construed as one belonging to the the class of policies FURNISHING INDEMNITY AGAINST LOSS FROM LIABILITY FOR DAMAGES, rather than as being a contract insuring against liability simply."

The cases relied on by the assured in the Circuit Court of Appeals have no bearing upon the question here involved. Not one of them construed a contract "against loss from liability," but they all passed upon policies "against liability for damages." One of them, however,—Anoka Lumber Company vs. Fidelity and Casualty Co., 63 Minn. 286— is the only case which has come under our observation, where the insurer, after notification of suit, refused to come in and defend. Nothwithstanding this refusal, the

suit proceeded to judgment, and, although the assured was insolvent, it was decided that the insurer was liable under its policy, it being an insurance "against all liabilities on account of fatal or non-fatal injuries suffered by an employee." As it was indisputably a contract to insure against liability and not one of indemnity against loss, the Court said :

> "From the very terms of the instrument itself, it is not merely an agreement to indemnify the plaintiff against any act of the employe, but, that in case of an accident of such a character as to injure him, whereby a cause of action against the assured arose, the insurer or company will assume the liability."

In American Employers', etc., Insurance Co. vs. Fordyce, 62 Ark. 562, the insurer bound himself to pay "all damages with which the insured might be legally charged or required to pay, or for which it *might become legally liable.*" This was manifestly a contract to pay on account of liability.

So in the case of Ross vs. American Employers' Liability Insurance Co., 56 N. J. Eq. 41. There the undertaking of the insurer in one of the policies was "that said company will pay to the insured all damages with which the insured may be legally charged under the common law or any statute ;" and the other was "that said company will pay to the insured all damages with which the insured may be legally charged or which the insured may be required to pay by reason of any liability on account of injuries inflicted upon the persons, etc."

The policy there did not undertake to indemnify the assured against loss from common law or statutory liability, but it was an insurance against all damages with which the assured might be legally charged.

In Kansas City, Memphis and Birmingham Railway Co. vs. Southern Railway News Co., 151 Mo. 373, the contract was that the insurer "agrees for such consideration to indemnify

said Railroad Company and save it harmless from all claims, demands, damages, actions, costs and charges to which the Railroad Company may be subject, or which it may have to pay by reason of any injury to any person or property, or loss of life or property suffered or sustained by any agent or employee of the News Company."

This case has no bearing upon the present controversy, because whilst the term "indemnify" is employed, the further agreement was to save the assured harmless from all claims, demands, damages, actions, etc., which was primarily an obligation independent of the question as to whether or not the claim had been paid.

We have been able to find but one case where a policy containing provisions similar to the one now before your honors, has been construed to be an idemnity "against liability for damages," and that is Sanders vs. Frankford Ins. Co., 72 N. H. 465; s. c. 57 Atl. Rep. 655. This conclusion was reached by the Supreme Court of New Hampshire after a review of all the authorities. In the following year, 1905, the Supreme Court of Massachusetts construed a like policy, and after a review of practically the same authorities, disapproved the doctrine and reasoning of the Sanders case, and held that there could be no recovery except upon payment of a judgment after a trial of the issue. As has been stated, the Supreme Court of New York and the Superior Court of Pennsylvannia also declined to follow the New Hampshire decision. Thus we have the highest Courts of Maine, New Jersey, Michigan, Tennessee, Iowa and Massachusetts, and the Supreme Court of New York and the Superior Court of Pennsylvannia holding policies similar to ours to be contracts "against loss from liability," whilst the Supreme Court of New Hampshire stands alone in construing such contracts to be insurance "against liability."

It remains for us to consider whether or not the denial by the company of liability and its refusal to defend the Heideman suits was a breach of its contract; and if so, whether

in the circumstances of this case it was such a breach as to bring about a release or waiver of the right of the company to insist that the suits should proceed to judgment after a trial of the issue, and its further right to insist that the assured should first satisfy such judgment before making claim against it under the policy.

But before doing so, let us see if the policy should not be construed as though entered into between individuals. As was said by Mr. Justice Jackson in Imperial Fire Ins. Co., vs. Coos County, 151 U. S., 452, 462:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparitively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

Whilst it is true, as said by your Honors in that case, where an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most fair to the assured, you also said, on page 463:

> "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense."

As said by Mr. Justice Shiras, in Baltimore and Ohio Railroad Company vs. Voight, 176 U. S., 499.

> "The right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of Courts of Justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

So Mr. Justice Field, in Riddlesbarger vs. Hartford Insurance Company, 7 Wallace, 390, said:

> "The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses."

Applying this rule of construction, the plain and obvious meaning of the parties to this contract was, that if an accident happened, the company was to be immediately notified in writing, with full particulars of any claim made on account thereof. This was done, and the company, believing that the driver of the wagon which collided with Mrs. Heideman was not an employee of the assured, promptly gave notice to that effect. Then provision is made for notice of

suit, and it is to be particularly observed that under condition 2, it is not every suit instituted against the assured that the company undertook to defend, but it was only such suits as might have been brought "to enforce a claim for damage on account of an accident *covered by this policy.*"

If, as has been shown, this company in good faith believed that the driver of the wagon was not an employee of the assured, it was its privilege and right to refuse to defend upon the ground that the "*accident was not covered by the policy.*"

These provisions relating to notice were for the better protection of the company and to safeguard its responsibility. The right reserved to defend or settle, unless it elected to pay the amount of indemnity under clause "A," was placed there in its own interest. As said previously in this brief, had the company believed the accident was covered by the policy, and that its chance of success in defending the suits was very remote, rather than incur the cost of defense, it could have done one of two things: Either settle with the plaintiffs, or pay the full indemnity to the assured. If, on the other hand, it elected to defend and was unsuccessful, there would have been no further liability upon its part to the assured, except to reimburse it to the extent insured, upon payment by the assured of the judgment recovered.

We do not find it ever to have been held that a failure to defend converted the contract from one "against loss from liability" to one simply "against liability." Were this effect given to such action upon the part of the company, then the company would ever be at the mercy of the assured. It might as well be contended that the refusal of a fire insurance company to pay in a case of a fire, or a life insurance company to pay in case of death, constituted a waiver of the various conditions and provisions of the policy in its favor. Such obligations were more sacred than was ours to defend; but, it cannot be that we thereby incurred any other or greater penalty than to reimburse the assured, in addition

to the indemnity agreed upon, a sum equal to reasonable counsel fees laid out and expended in doing that which we refused to do, and even then only after payment of a judgment recovered after a trial of the issue.

As our contract was only to indemnify the assured against "loss from common law or statutory liability," and as it was expressly and unequivocally agreed between the parties that no action should lie against the company "FOR ANY LOSS UNDER THIS POLICY, unless it should be to reimburse the assured for loss actually sustained and paid by him in satisfaction of a judgment," how can it be successfully contended that the assured has met with any loss whatever which is covered by the policy?

The assured boldly asserts its claim, not only in violation of the condition just referred to, but also in violation of another express condition, that it would not settle *any claim or suit* without the written authority of the company, and in the very teeth of the condition that such settlement should be "*at its own cost.*" The assured is solemnly asking this Court to permit it to recover money which it agreed should not be recoverable, simply because it feared that if it continued the defense of the suits to trial "*heavy judgments*" would be recovered against it. In other words, that the judgments would exceed the insurance, which excess it would be compelled to pay out of its own treasury. This liberality with the company's money is not justified by the reasonable construction of any provision of the policy. As the company did not consent to the compromise, paragraph 8 is paramount. There is no escape from it.

The attitude of the assured is simply this: It was sued for $13,000; it feared heavy judgments, and rather than run the risk of a trial it compromised the suits without our consent. Being exposed to the danger of judgments in excess of any possible liability of the company, it compromised "at its own cost" and now asks to be reimbursed. No such contract was ever made by the company.

It never having been judicially determined in the litigation between the Heidemans and the assured that the latter was liable for the injury complained of, and *a fortiori*, it never having been determined that Berry was an employee of the assured, the very question always in dispute between the assured and the company, it cannot be said that the company was ever in default under its policy. This dilemma of the assured cannot be more forcibly illustrated than by the sixth question submitted to your Honors.

The Supreme Court of New Hampshire, in Sanders' case (*supra*), said in part:

> "The purpose and meaning of clause 8 is apparent upon consideration of the situation which the parties must have contemplated as a probable result of their engagements. It is not probable that the parties contemplated and attempted to provide for the contingency of a suit between themselves upon a claim as to which the liability of the insurance company was conceded. An inspection of the policy, which is made a part of the case, disclosed a "special agreement" B and "general agreements" 4 and 5, to the effect that the policy does not cover certain accidental injuries for which the insured might become liable. As to whether the policy covered a particular accident was a question as to which it could be foreseen controversy might arise. It was therefore within the contemplation of the parties that a suit might be brought against the insured for accidental injuries not covered by the policy. No claim except for immediate surgical relief could accrue against the company without notice of a suit. Upon the receipt of such notice the company was called upon to recognize or deny liability. If they denied their liability and refused to perform their contract of indemnity in the manner specified in clause 2, such decision would not be binding upon the assured; and in a controversy between the parties the assumption of the defense by the company might be considered to be an admission of liability under the policy. There was no reason why they should defend if not liable. The purpose of clause 8 was, therefore, to provide for the cases, if any should

arise, where the company contended the claim arose from an accident not covered by the policy. It was intended to limit the liability of the company to damages ascertained by due course of judicial procedure in cases where they could not conduct the defense without waiving their claim that they were not liable, and as to which, if not liable, they were under no obligation to incur any expense. Its purpose was to prevent collusion between the plaintiff and the assured."

The concluding sentence of that opinion is as follows:

> "Whether in a case where the company did not so proceed [take control of the proceedings in a suit against the assured], the assured could in any form of procedure obtain any benefit from the contract of indemnity except upon proof of the payment of damages after a trial of the issues is not now before the Court."

It is too clear for argument that, when the parties to this contract for insurance made it, they contemplated that the company might wrongfully deny liability thereunder, and thereby compel the assured to resort to law to enforce its rights, and accordingly inserted paragraph 8. This paragraph, by its very terms, could never apply except to cases when there was litigation against the company, and there could not be litigation unless the company wrongfully denied its liability in whole or in part under the policy, or otherwise committed a breach of the contract evidenced thereby. Therefore, it follows that the parties never intended that a wrongful denial of liability or other breach of the contract by the company should waive this paragraph. Upon the authorities cited persons may provide what shall be their rights and liabilities in the event of breach of their contracts. If they do so provide and the condition arises which they contemplated, it can hardly be maintained that the cause which produced, and which was the only cause that could produce the condition, namely, wrongful denial of liability or other breach of the contract and resulting litigation, waived the provision

which by mutual consent was to apply when that condition should arise. Further, we fail to see anything in the policy and paragraph 8 thereof, from which it can be inferred that any denial of liability or other breach of the contract by the company at, or shortly after the accident, has any different or other effect from such a denial or breach at a later stage of the proceedings. If this is true that the policy sued on being a contract for indemnity against *loss from liability* and not simply against liability, the necessary consequence is, that the assured cannot maintain an action for a sum paid in settlement of an alleged liability because it is not "brought by the assured for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." If paragraph 2 stood alone it might be argued with force that this clause, forbidding the settlement of claims without the consent of the company in writing, should be operative only so long as the company performed its part of the contract; but this paragraph, as has been heretofore said, is controlled by paragraph 8, which stipulates in effect in the event of a breach of the contract by the company and the settlement of a claim (not merged into a judgment) by the assured without the requisite consent, that the assured cannot recover the amount so paid.

Question three is, somewhat general in that it does not refer to any specific paragraph of the policy, but asks whether "the compromise by the assured of the suits after the assurer denied liability and refused to defend them, and the payment by the assured of the damages claimed of it pursuant to the compromise without the consent of the assurer, and without the rendition of a judgment or a trial of the issues, prevent the assured from securing any recovery of the assurer upon the policy on account of the negligence, accident and injuries described."

The amount sued for by the assured is made up of two items, namely, the sum of two hundred and fifty dollars ($250), paid counsel employed by the assured for profes-

sional services, and the sum of twenty-five hundred dollars ($2,500) paid in settlement of the suits.

The latter item cannot be recovered because of the provisions of paragraph eight of the policy, already discussed. If it is urged that paragraph 8 was not intended to cover such a case as this, where it is alleged that the company broke its contract, and that this is not an action "as respects any loss under this policy," but a suit to obtain redress for the breach of the contract evidenced by the policy, it can be answered that the company has not broken the contract by refusing to pay the assured the amount paid out by it in settlement, for in no part of the instrument does it promise to do so, and the measure of damages, if any, for its denial of liability, or for its refusal to defend the suits, assuming that its conduct in so doing was wrongful, is not the amount paid in settlement by the assured. If the policy in question had been a flat contract to indemnify the assured against any liability for damages, and unlimited as to amount, and the company breached the contract, then it could be argued with great force that the amount paid in compromise would be the measure of damages sustained by the assured. In this case, however, the policy was indemnity against loss from liability limited as to the amount, and contained no obligation on the part of the company to reimburse the assured, except for money paid out in satisfaction of a judgment. Who can say what the verdicts and judgments would have been if the Heideman suits had gone to trial? They might have exceeded the limit of the policy by a greater amount than the amount now claimed by the assured of the company, and the assured evidently feared this, for it is so alleged in its petition. On the other hand, the verdict might have been in favor of the assured. Therefore, no one can tell whether the assured has been actually damaged or not.

Now, as to the other item, for professional services. In the first place, we do not think that it is included in the

third question, for that refers to "recovery of the assurer upon the policy on account of the negligence, accidents and injuries described."

If the company refused to defend, and the assured employed counsel to defend, and did actually defend suits which it was the duty of the company to have defended, it might well be that the amount recoverable from the company for breach of the contract in this particular would be the amount paid by the assured as compensation to its counsel so employed. In this case, however, the counsel employed did not defend the suits, for the same were settled without trial or a contest. In Sanders vs. Frankfort Insurance Company, *supra*, the provision in the policy under consideration as to defense of suits was under discussion and the Court uses this language:

> "If 'to defend' means 'to protect, to secure against attack'—in short, to successfully defend—it is perfectly clear that the insurance company agree to perform their covenant of indemnity against loss by assuming the liability. This is conceded. But it is claimed that the agreement to defend against the proceedings means merely to contest the suit to final judgment. While, in a technical sense, to defend a suit is to contest it, the word 'defend' also includes the broader meanings above suggested. (Webster's Dict.) If the meaning were, as is claimed, merely the conduct of the litigation until judgment should be rendered, no reason has been suggested why the purpose was not explicitly stated. Having entered upon the defense of the suit, no way is perceived by which (at least, before judgment) the insurance company could escape liability, except by settlement with the plaintiff or payment to the assured. The engagement is not merely to contest the suit to judgment, but to 'defend against such proceedings,' meaning necessarily all the proceedings in the suit founded upon the claim for damages against the insured. The judgment is a proceeding in such a suit, as also is the execution. After final judgment, payment is ordinarily the only defense open which will defeat further progress in the proceedings—the issuance of execution."

Assuming that we are liable for failure to defend, we do not see why the assured can recover a greater sum than was paid by it to counsel to defend the suits. As this sum was $250, no recovery can be had in this action for counsel fees, because if the other items, namely, those paid to compromise the suits, can be properly excluded, the jurisdictional amount is wanting; the demurrer should also be sustained on the ground that the assured united in its petition, in addition to its claim for counsel fees, a claim which is clearly not recoverable.

Under the form of policy in this case the liability of the assured to the injured person cannot be litigated, in the *first instance*, in an action by the assured against the company, because under paragraph 8 the parties agreed that the action against the assured should proceed to judgment after trial of the issue. This protection the assured agreed to give the company. It requires but little reflection to appreciate the importance of this protection to the company. Moreover, it can readily be seen, that, as in this case, the suits having been compromised and the liability of the assured to the injured person practically admitted, at all events established by consent of the assured, but without the consent of the company, the company does not stand in the same position to have the question of the assured's liability as fairly and impartially tried as though the suits had proceeded to a trial and judgment in proceedings, in which the assured would have been vitally and pecuniarily interested.

For the aforegoing reasons we respectfully submit that the several questions should be so answered as will result in the affirmance of the judgment of the Circuit Court of the United States for the Eastern District of Missouri.

FRANK GOSNELL,
GEO. WEEMS WILLIAMS,
Attorneys, and of Counsel for
Maryland Casualty Company.

Supreme Court of the United States.

No. 197.—October Term, 1905.

St. Louis Dressed Beef and Provision Company *vs.* Maryland Casualty Company.	On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[March 19, 1906.]

This case was brought here on the following certificate:

"The judgment which the writ of error challenges sustained a demurrer to the petition and dismissed the action. The plaintiff in its petition alleged the existence of these facts: The plaintiff is a corporation of the State of Missouri, and the defendant is a corporation of the State of Maryland. On June 16, 1900, the defendant in consideration of the payment of $168 issued to the plaintiff a policy which contained these provisions: 'In consideration of the application for this policy, a copy of which is hereto attached and which is made part of this contract, and of one hundred sixty-eight dollars ($168) premium, Maryland Casualty Company, of Baltimore, Maryland, (hereinafter called "the company") does hereby agree to indemnify St. Louis Dressed Beef & Provision Co. of St. Louis, county of ——, State of Missouri, hereinafter called "the assured" for the term of one year beginning on the fifth day of July, 1900, at noon, and ending on the fifth day of July, 1901, at noon, standard time, at the place where this policy has been countersigned, against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any person or persons, and caused through the negligence of the assured, by means of the horses or vehicles in his services, and the use thereof, as described in the application and while in the charge of the assured or his employees. Provided, however, that:

"'A. The company's liability for an accident resulting in injuries to, or in the death of one person is limited to five thousand dollars ($5,000) and subject to the same limit for each person; the total liability for any one accident resulting in injuries to, or in the death of any number of persons is limited to ten thousand dollars ($10,000).

"'This insurance is subject to the following conditions, which are to be construed as conditions precedent of this contract:

"'1. The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing, with full particulars to the home office of any claim which may be made on account of such accident.

"'2. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company will defend against such proceeding, in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for in clause 'A' of special agreements as limited therein.

"'3. The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding, without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured when requested by the company shall aid in securing information and evidence and in effecting settlements, and in case the company calls for the attendance of any employee or employees as witnesses at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time.

"'8. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above. In no case except that of minors shall any action lie against the company after the expiration of six years from the date of the given injuries or death. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy.

"'This policy shall only cover losses sustained by and liability for any claims against the assured as a result of the risk specified in the contract or contracts hereto attached, and is issued and accepted upon the condition that all the provisions printed on the slip or slips attached to this policy are accepted and shall be fulfilled by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed.'

"The portion of the policy hereinbefore quoted commencing with the words 'against loss from common law or statutory liability' and ending with the words 'entitled to make under this policy' at the close of paragraph numbered 8, were printed on the slip attached to the policy.

"On May 25, 1901, the plaintiff became liable for damages on account of bodily injuries accidentally suffered by Mrs. Nellie Heideman and caused through the negligence of the plaintiff by means of a horse and

vehicle in its service and the use thereof as described in the application for the policy and while in charge of one John Berry, who was one of the plaintiff's employees. The plaintiff immediately gave the defendant notice of the accident and of the fact that Nellie Heideman made a claim against the plaintiff for damages on account of the bodily injuries she had suffered from the accident and that Henry Heideman, her husband, also made a claim for damages against it on account of the loss of the services of his wife and of the expenses of physicians and nurses which resulted to him from her bodily injuries. On August 16, 1901, the defendant notified the plaintiff that it denied that it was liable to it on account of the damages resulting from the accident under its policy because, as it alleged, the driver of the plaintiff's wagon was not an employee of the plaintiff, but the fact was that this driver was an employee of the plaintiff and the accident and the damages were covered by the policy. On November 23, 1901, Nellie Heideman sued the plaintiff for $10,000 damages on account of the bodily injuries to her caused by the negligence of the plaintiff's driver and by the accident and Henry Heideman brought an action against it for $3000 damages which he alleged he sustained from the same cause. On November 29, 1901, the plaintiff in writing notified the defendant of the commencement of these suits and requested it to undertake the defense of said suits as its said policy provides it would do. But the defendant declined to undertake the defense upon the alleged ground that its policy did not cover the accident or the claims while the fact was that it covered both. The injuries to Mrs. Heideman were, among others, the breaking of her right hip-joint socket bone, were serious and permanent and the plaintiff was liable for damages in each of the suits. It feared heavy judgments if the actions were permitted to proceed to trial. Thereupon, on April 15, 1902, it compromised the suits and paid Mrs. Heideman $2,000 damages and her husband $500 damages on account of the injuries caused by the accident and the negligence of its driver.

"The petition also contained the following averments: 'The plaintiff served on defendant a written notice notifying it of the terms of settlement offered by said Nellie Heideman and Henry Heideman for the injuries sustained and damages suffered by them respectively, as aforesaid, and that plaintiff proposed to accept said settlements and pay said amounts, and to hold defendant responsible for such payment under its aforesaid policy; that defendant interposed no objection to said proposed settlements, relying upon its said disclaimer of any liability under said policy by reason of its alleged claim that the driver of said wagon was not in the employ of the plaintiff herein; and that said defendant by reason of the said denial and disclaimer of any liability waived all the conditions of the said policy as herein set forth. Plaintiff further states

that by reason of defendant's failure and refusal to defend said actions brought by Nellie Heideman and Henry Heideman against plaintiff, and by reason of the waiver aforesaid, it was obliged to and did defend said actions and employed counsel for that purpose, at an expense of two hundred and fifty dollars ($250.00), and that said employment of counsel was reasonably necessary, and that said sum of $250.00 is the reasonable value of said services so performed.'

"And the circuit court of appeals for the eighth circuit further certifies that the following questions of law are presented by the assignment of errors in this case, that their decision is indispensable to a decision of this case and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following questions:

"1. Did the denial of all liability by the assurer and its refusal to defend the suits in the name and on behalf of the assured as provided by paragraph 2 of the policy constitute such a breach of the contract on its part that it released the assured from its agreement in paragraph 3 that it would not settle any claim except at its own cost without the consent of the assurer previously given in writing, and from the provision of paragraph 8 that no action should lie against the assurer as respects any loss unless for loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue?

"2. Were the provisions of paragraphs 3 and 8 of the policy that the assured should not settle any claim except at its own cost, without the consent of the assurer, previously given in writing, and that no action should lie against the assurer as respects any loss under the policy unless brought by the assured to reimburse it for loss actually sustained and paid by it in satisfaction of a judgment after trial of the issue, waived by the assurer's denial of liability under the policy and by its failure and refusal to defend the suits against the assured according to the provision in paragraph 2?

"3. Did the compromise by the assured of the suits against it after the assurer denied liability and refused to defend them and the payment by the assured of the damages claimed of it pursuant to the compromise, without the consent of the assurer and without the rendition of a judgment or a trial of the issues, prevent the assured from securing any recovery of the assurer upon the policy on account of the negligence, accident and injuries described?

"4. Considering the terms of the policy, is the right of the assurer to insist upon the condition of paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured dependent upon the assurer's defense of the action against the assured according to the provision in paragraph 2?

"5. Considering the terms of the policy, is the assurer's denial of liability under the policy a waiver of the condition in paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured?

"6. Under the terms of the policy may the liability of the assured to the injured person and the extent of that liability be litigated in the first instance in an action between the assured and the assurer where the assurer has denied its liability under the policy and has refused to defend an action brought against the assured by the injured person?"

Mr. Justice HOLMES delivered the opinion of the Court.

An elementary remark or two will do something toward answering these questions. The form of the declaration does not appear, but we may suppose a count upon the Casualty Company's refusal to defend the suit against the plaintiff. If the defendant's contention is right, that breach made it impossible for the plaintiff to entitle itself to the payment promised in the policy according to its terms. But the defendant could not set itself free by so simple a device. In general, when one party by his fault prevents the other party to a contract from entitling himself to a benefit under it according to its terms, the former is liable for the value of that benefit less the value or cost of what the plaintiff would have had to do to get it. In this case the plaintiff had nothing more to do or to pay after it had been compelled to satisfy the claim against it. And therefore, on general principles, it would be entitled to demand the whole amount which the jury might find that it would have received had the contract been performed. *Hinckley* v. *Pittsburg Bessemer Steel Co.*, 121 U. S. 264.

It is suggested, to be sure, that the plaintiff should have defended the suit against it. But not only was that not one of the plaintiff's undertakings, but it was expressly forbidden to the plaintiff by the contract, as no doubt the defendant would have pointed out had that course been taken. Moreover, the defendant, by its refusal, cut at the very root of the mutual obligation and put an end to its right to demand further compliance with the supposed term of the contract on the other side. The only concern of the plaintiff was to establish reasonable ground for believing that if the defendant had not broken its contract it would have been called on to make a payment to the plaintiff, and how much that payment would have been.

Looking at the substance of the matter, it makes no practical difference, no difference in the amount of the defendant's liability, whether we say that the defendant by its conduct made performance of the conditions by the plaintiff impossible, and therefore was chargeable for the sum which it would have had to pay if those conditions had been performed, or answer, in the language of the questions, that performance of the con-

ditions was waived. The sole difference would be in the form of the declaration. In either case the plaintiff would declare upon the policy, only the breaches assigned would not be the same. In the former the breach would be the refusal to defend, in the latter the refusal to pay. If it is necessary to consider the question in a technical aspect, we think that the plaintiff was entitled to treat the contract as on foot, notwithstanding the defendant's act, and go on with it cy-près. Under the circumstances it could not comply literally with the words, and was justified in doing the best thing that could be done for the interest of both. The defendant by its abdication put the plaintiff in its place with all its rights. To limit its liability as if its only promise was to pay a loss paid upon a judgment is to neglect the meaning and purpose of the reference to a judgment, and even the words of the promise. The promise in form is to indemnify against loss by certain kinds of liability. The judgment contemplated in the condition is a judgment in a suit defended by the defendant in case it elects not to settle. The substance of the promise is to pay a loss which the plaintiff shall have been compelled to pay, after such precautions and with such safeguards as the defendant may insist upon. It saw fit to insist upon none.

We assume that the settlement was reasonable, and that the plaintiff could not expect to escape at less cost by defending the suits. If this were otherwise no doubt the defendant would profit by the fact. The defendant did not agree to repay a gratuity, or more than fairly could be said to have been paid upon compulsion. But a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution.

But there is another aspect of the eighth condition of the slip which requires a few words more. It is said that this condition expressly contemplates a breach of contract by the company and defines the plaintiff's rights in that case. The words "no action shall lie against the company as respects any loss under this policy unless," &c., certainly do contemplate a case in Court in which the company may turn out to be in the wrong, and therefore technically guilty of a breach of contract. But notwithstanding the contrary suggestion in *Sanders* v. *Franfort Marine, Accident & Plate Glass Ins. Co.*, 72 N. H. 485, 498, 499, we think that the only breach which that condition has in view is a refusal by the company to pay after the decision in a case of which it has taken charge, when, notwithstanding the judgment, it conceives itself to have a defense. The action referred to is an action for money alleged to be due under the policy. Contracts rarely provide in detail for their non-performance. It would be stretching the words quoted to a significance equally hurtful to both parties, and probably equally absent from the minds of both, to read them as having within their scope an initial repudiation of liability by the de-

fendant and a requirement that in that event the plaintiff should be bound to try the case against itself, although it should be plain that by a compromise it could reduce its claim on the defendant as well as its own loss.

If there is anything in the doubt whether the defendant, by assuming the defense of the original suit, would not lose its right to deny that the policy applied, even if it purported to save that right, it does not change our opinion. The requirement of a trial and judgment would not accomplish the object suggested, to make collusion impossible. The objections to thus hampering the *dominus litis* have been touched upon, and there would be presented the anomaly, if not the monstrosity, of a party attempting to provide by contract that if he should do what by general principles of contract forfeited his right to make further requirements of the other side, his conduct, on the contrary, should impose new obligations on the other side. If the defendant kept its contract, it would defend the suit, and the plaintiff would have no duties. If it refused to do as it had promised, we cannot think that it was entitled to complain that the plaintiff did not do it when the interest of both was the other way. Before a policy should be construed to have such an extraordinary effect honesty requires that the assured should be notified of his duties in unmistakable words.

We answer the first, second, fourth and fifth questions in the affirmative, the third in the negative and the sixth in the affirmative, so far as the question is warranted by the facts set forth. It will be so certified.

True copy.

Test:

Clerk Supreme Court, U. S.